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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

TAMIR MEKAHEL,

Plaintiff and Appellant,

v.

J. MURREY CONSTRUCTION, INC. et
al.,

Defendants and Respondents.

E042433

(Super.Ct.No. SCV98565)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Christopher J.
Warner, Judge. Affirmed.

Tamir Mekahel, in pro. per., for Plaintiff and Appellant.

Dill and Showler and Scott Showler for Defendant and Respondent J. Murrey
Construction, Inc.

Booth, Mitchel & Strange, Sean T. Osborn and David L. Hughes, for Defendants and Respondents Safeco Insurance Company of America and Great American Insurance Company.

I. INTRODUCTION

Tamir Mekahel, an individual doing business as M.T.K. (MTK or Mr. Mekahel), entered into a subcontract with J. Murrey Construction, Inc. (Murrey), a general contractor, to install ceramic tile at a high school and five elementary schools in the Fontana Unified School District (FUSD). MTK sued Murrey, its alleged payment bond surety, Great American Insurance Company (Great American), and its alleged performance bond surety, Safeco Insurance Company of America (Safeco), seeking \$494,493.27 for “extra” work MTK claims was not included within the scope of work described in the project documents. Following a five-day bench trial, the court issued a statement of decision finding that MTK failed to prove its claims against any of the defendants and entered judgment in favor of defendants.

MTK or Mr. Mekahel was represented by counsel at trial, but represents himself on this appeal. In his opening brief, Mr. Mekahel essentially argues that the trial court erroneously failed to accept his interpretation of the project documents or the scope of work contemplated by his subcontract over a contrary interpretation advanced by defendants. At trial, Mr. Mekahel claimed that when he arrived on the school jobsites he discovered that much more existing tile had been demolished than he had anticipated based on the project documents; consequently, much more tile had to be installed than he

had expected, and this required substantially more labor and materials. The trial court rejected Mr. Mekahel's testimony and accepted defendants' contrary interpretation of the project documents, for the reasons set forth in its statement of decision. The court also found that Mr. Mekahel failed to sufficiently document his \$494,493.27 "total cost" claim for extra work, and even failed to show that the labor and materials components of the claim were related to the jobsites in question.

Defendants argue that Mr. Mekahel is only rearguing issues of fact that the trial court resolved against him, and has failed to identify any prejudicial error or articulate any cognizable grounds for appeal. We find no error. The trial court expressly found that Mr. Mekahel's credibility concerning his interpretation of the project documents was "substantially undermined," and, furthermore, substantial evidence supports the court's adoption of defendants' contrary interpretation as the more reasonable interpretation. The court also properly found that Mr. Mekahel failed to prove any part of his claim for extra work. We therefore affirm the judgment.

II. THE EVIDENCE PRESENTED AT TRIAL

A. *Background*

On December 26, 2000, MTK and Murrey entered into a subcontract agreement, which required MTK to provide labor, material, and equipment necessary to furnish and install ceramic tile at a high school (Group 4) and five elementary schools (Group 6) within the FUSD. The original amount of the subcontract was \$410,000. At trial, MTK claimed it was owed an additional \$494,493.27 for extra work. The bulk of MTK's claim

consisted of \$356,220.49 in additional labor, tile, and raw materials costs. The balance of the claim was for overhead and profit.

The principal issue at trial concerned the interpretation of the project documents or scope of work MTK was required to perform pursuant to its subcontract. The project documents included drawings, plans, and specifications, and were incorporated by reference into the subcontract. The parties agreed that MTK was not required to demolish any existing tile in any of the schools and was not required to install any backer board or substrate in any of the elementary schools.

The parties specifically disputed (1) the amount of tile MTK was required to install at the various schools, and (2) whether MTK was required to install any backer board or substrate at the high school. MTK argued it was not required to install any substrate at the high school. The parties also disputed whether MTK had sufficient evidence or documentation to support its \$494,493.27 “total cost” claim for extra work.

B. The Witnesses’ Testimony

MTK called two witnesses, its principal Mr. Mekahel and “tile work expert” Gil Chotam. Defendants called Sean Balingit, the project manager for Murrey at the time of the FUSD project, and Richard Tasker, a consultant hired by defendants to review MTK’s claim and the documents MTK produced to support its claim.

1. MTK’s Witnesses/Mekahel and Chotam

Mr. Mekahel testified that he interpreted the project documents for the high school (Group 4) and the separate project documents for the elementary schools (Group 6) as

requiring MTK to install far less tile than defendants understood the documents as requiring. To support his interpretation, Mr. Mekahel principally relied on the demolition plans and the finish schedule for all of the schools. He read the demolition plans as calling only for “selective” demolition of existing tile in most areas, as opposed to “wholesale” or more complete demolition of existing tile.¹ He also read the finish schedule as indicating where both *existing and new tile* were to be located at the end of the job, and not as indicating only where new tile was to be installed. Regarding the specific components of his claim for extra work, Mr. Mekahel admitted he either did not have or had not kept various documents that would have supported his claim.

Mr. Chotam was a consultant in tile and stone work and had reviewed the drawings for the FUSD project, including the finish schedule. He testified that, when a project involves a new building, everything shown on a finish schedule is clearly new; however, when a project involves an existing building, the finish schedule *could* show new work, existing work, or both. And if the finish schedule does not clearly distinguish new work from existing work, the other project documents should be examined for “clues.” In addition, the subcontractor should request a clarification of any ambiguities in the project documents.

Mr. Chotam said the finish schedule for the high school did not clearly indicate that all of the tile was new, and the other project documents, including the specifications

¹ The plans were admitted into evidence as exhibits 7A (for the high school) and 7B through 7F (for the five elementary schools).

and drawings, were confusing on the question. In other words, he said the project documents were ambiguous “but not more than any other ones.” Before presenting his \$410,000 bid, Mr. Mekahel did not make a prebid request for information or clarification of the project documents.

Mr. Chotam said that when, as here, the project documents are ambiguous, the subcontractor should qualify its bid by making sure it reflects his understanding of the project documents or the scope of work described in the project documents. Mr. Chotam claimed Mr. Mekahel had qualified his original \$410,000 bid by stating it was for “thin set over cement backer board and that the cement backer board [was] not included.” However, Mr. Chotam did not address whether Mr. Mekahel’s bid reflected his restrictive understanding of the *amount* of tile that was to be installed, and his further understanding that no backer board or substrate was to be installed in the high school.

2. The Defense Witnesses/Balingit and Tasker

Mr. Balingit, the former project manager for Murrey, oversaw the execution of MTK’s subcontract. Mr. Balingit described MTK as “a difficult sub,” in part because MTK “[d]id not seem to be familiar with the process or willing to abide by the process as called for in the contract documents.” Mr. Balingit disputed Mr. Mekahel’s interpretation of the project documents.

First, Mr. Balingit disputed Mr. Mekahel’s claim that MTK was not required to install any substrate in the high school. Mr. Balingit testified that the project documents for the high school, which were distinct from the project documents for the five

elementary schools, called for MTK to install mortar bed or substrate before installing new tile.

Mr. Balingit explained that a proper interpretation of the plans requires finding “the specific pathway” from the area of work shown in the plans to the detail. Furthermore, all of the project documents, including, but not limited to, the plans, specifications, project manual, and “blowups,” must be interpreted as a whole. Mr. Balingit said, “You cannot just pull up the detail and say that this detail applies to all work in all areas of the project,” as Mr. Mekahel had done. And here, the drawings and specifications for the high school called for installing mortar bed or setting bed on the walls. Furthermore, Mr. Mekahel’s bid did not clarify that it did not include installing any mortar bed in the high school.

Regarding the amount of tile to be installed, Mr. Balingit explained that the finish schedule for the elementary schools indicated that no “existing tile” was to remain in any areas at the end of the project, because no “E” notations for “existing” tile were shown anywhere on the finish schedule. Instead, “CTT” notations for “ceramic tile thin set” were shown throughout the finish schedule. In addition, specification No. 09310, which was included in the project documents, was for ceramic tile thin set.

Mr. Balingit further explained that only the heavier demolition work was noted on the demolition plan, but that did not mean that no demolition work was to be performed in other areas. He said it was “not as simple as just looking at one of the finish schedules or one of the specifications or one [of] the floor plans”; instead, the project documents as

a whole had to be interpreted. In addition, the construction manager had written a “scope of work summary” showing that all existing tile had to be removed. And the sample tile that Mr. Mekahel submitted to Murrey did not match the existing tile. Thus, according to Mr. Balingit, Mr. Mekahel’s claim that he was only to perform “a patch job where the finish was to match existing [tile] and we were just going to take a few tiles out and patch them back” was “ludicrous.” Balingit also testified that, immediately after a “preconstruction” or “pretile installation” meeting he attended with Mr. Mekahel and the owner, Mr. Mekahel said he had “bid the job ‘tight’” and had done so because he saw a “glitch or an error” in the plans and he would be making a claim for extra work.

Mr. Tasker was a consultant who analyzed “troubled construction jobs.” He was hired by defendants to analyze MTK’s \$494,493.27 claim for extra work, and found insufficient documents to support the claim. Mr. Tasker first noted there was no “backup” documentation to support MTK’s original bid of \$410,000. That is, there were no documents reflecting the basis of the \$410,000 bid including, for example, invoices or job cost reports reflecting the quantities, prices, and assumptions underlying the bid. He said such documentation “almost certainly would have existed,” but was not provided.

The claim included \$356,220.49 for “additional tile work,” which was comprised of approximately \$163,409 for tile material, \$28,000 for raw material, and \$164,811.50 for labor costs. MTK had submitted “certified payroll records” showing it had incurred approximately \$216,000 in labor costs on the entire job, and it was unclear whether or to what extent the \$164,811.50 claim for additional labor costs was included in the

\$216,000 figure for the entire job. Mr. Tasker also found no documentation to support the \$163,409 in additional tile materials or \$28,000 in additional raw materials. Murrey had issued joint checks to MTK and its materials suppliers for approximately \$145,000 in materials, and the suppliers had provided releases in exchange for the payments. There was no indication how MTK had incurred \$163,409 in tile materials or \$28,000 in raw materials in addition to its original costs of approximately \$145,000 in materials.

Mr. Tasker explained that a “total costs claim” is a construction term for calculating a contractor’s ultimate or final costs at the end of a job. It deducts the contractor’s “as planned” costs, and claims the balance as additional total costs or extra work. Total cost claims are subjected to a four-part test. First, the contractor must demonstrate that its original estimate was reasonably accurate. In other words, the starting point or planned costs must be accurate. Second, the actual costs incurred must be accurate and reasonable. Third, appropriate adjustments must be made to the actual costs for items such as change order work and contractor inefficiencies. Fourth, there must be no more accurate methods available for calculating the contractor’s costs. More accurate methods include time and materials tickets and individual change orders documenting the costs of the extra work.

In Mr. Tasker’s opinion, MTK’s \$494,493.27 claim for extra work failed each of these tests. Mr. Tasker explained there was no backup documentation to support MTK’s original \$410,000 bid, including the labor and materials costs and other assumptions upon which it was based. In addition, Mr. Tasker said, “there were better methods for pricing

extras and change work that were not only possible, [but] were utilized during the course of this contract.” These included “negotiated hard dollar amounts and time and material amounts that were actually used between the parties to make contract adjustments.” In contrast to these more accurate and discreet methods, MTK’s total cost claim of \$494,493.27 was based on an “after-the-fact” method of calculating costs.

3. MTK’s Rebuttal

In rebuttal, Mr. Mekahel acknowledged he had submitted discrete time and materials sheets for change order work, but he claimed it was impractical for him to track his extra work through time and materials sheets. He explained he could not reasonably distinguish the time and material he spent on base contract work from the time and material he spent on extra work, because the existing tile was demolished when he arrived on the job.

On cross-examination, Mr. Mekahel was unclear when asked whether any part of his \$164,811.50 claim for additional labor costs was included in his \$216,000 certified payroll figure. He claimed that only \$80,000 to \$90,000 of the \$164,811.50 figure was included in the \$216,000 certified payroll figure. The balance of approximately \$75,000 was not included in the \$216,000 figure, because it represented nonpayroll costs such as union dues, worker’s compensation premiums, and other insurance premiums. In any event, it was unclear whether any of the \$164,811.50 claim was for extra work.

*C. The Statement of Decision*²

In its statement of decision, the trial court found that Mr. Mekahel failed to meet his burden of proof on his claims against Murrey and its sureties. Regarding the scope of work issue, the court found that Mr. Mekahel failed to substantiate his claim that the plans were “ambiguous and/or misleading or downright inaccurate.” The court first noted that Mr. Mekahel failed to demonstrate that his original \$410,000 bid was ostensibly based on his restrictive interpretation of the project documents or scope of work. The bid, the court said, “simply sets forth lump sum amounts for labor and materials” for each of the schools, and was unaccompanied by any “back up documentation . . . demonstrat[ing] the manner and methods used by MTK to bid the project.” The court also found that Mr. Mekahel’s evidence “was disorganized, inconsistent and unintelligible” and it “could not and did not find . . . there were any unpaid amounts based upon the true scope of the work.”

The court also found that Mr. Mekahel’s credibility concerning his interpretation of the project documents was “substantially undermined” by the statement he made to Mr. Balingit that he had “bid the job ‘tight’” because he discovered a flaw in the plans,

² The court’s tentative decision became its statement of decision, because none of the parties timely requested a statement of decision. (Code Civ. Proc., § 632; former Cal. Rules of Court, rule 232.) In its tentative decision, the court directed that the tentative decision would become the court’s statement of decision unless at least one of the parties requested a statement of decision within 10 days. In that event, counsel or the sureties was to prepare the statement of decision. None of the parties requested a statement of decision. MTK filed extensive objections to the tentative decision essentially rearguing its interpretation of the project documents, but these objections did not amount to a request for a statement of decision.

and would be making a claim for extra work. In contrast to Mr. Mekahel, the court found Mr. Balingit to be “entirely credible and extremely knowledgeable with respect to the construction trades in general, and with respect to the specifics to the job in question.” The court also found that Mr. Mekahel failed to substantiate, with sufficient “back up” documentation, his “total cost” claim of \$494,493.27 for extra work, because (1) Mr. Mekahel admitted that the documentation supporting the labor and materials components of his claim had been destroyed, and (2) he failed to produce any evidence that either the labor or materials components of his claim was even related to the job in question.

III. DISCUSSION

A. *MTK’s Contentions on Appeal*

MTK claims the trial court “made an error by not recognizing the ambiguities that exist on the face of the contract documents.” In other words, MTK says, “[t]his appeal[] tests the interpretations of the scope of work in the contract between the parties.” In his opening and reply briefs, Mr. Mekahel sets forth at great length the reasons he believes the trial court should have accepted his interpretation of the project documents rather than the contrary interpretation advanced by Mr. Balingit.

Defendants point out that, in its statement of decision, the trial court found that MTK failed to sustain its burden of proof against any of the defendants, and MTK is not challenging this finding. Thus, defendants argue, MTK has failed to “identify any prejudicial error” by the trial court and has failed to articulate any cognizable grounds for its appeal. For the reasons that follow, we affirm the judgment in favor of defendants.

B. *Applicable Law*

The judgment of a trial court is presumed correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) “The burden of demonstrating error rests on the appellant.” (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)

The terms of a contract must be interpreted to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) And where the terms of the contract are ambiguous or uncertain, determining the terms of the contract is a question of fact for the trier of fact (here, the trial court), based on “all credible evidence concerning the parties’ intentions.” (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.) In addition, “[c]ontract law provides an extensive set of rules to guide the [trier of fact] in using the available evidence to construe the agreement.” (*Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, 112 (dis. opn. of Kennard, J.); Civ. Code, §§ 1635-1657; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §§ 741-758, pp. 827-851.)

Where, as here, the trial court has resolved disputed factual issues concerning the proper interpretation of a contract, we review the trial court’s ruling according to the substantial evidence rule. “If the trial court’s resolution of the factual issue is supported by substantial evidence, it must be affirmed.” (*Winograd v. American Broadcasting Co.*, *supra*, 68 Cal.App.4th at p. 632.)

“‘The substantial evidence standard applies to both express and implied findings of fact made by the superior court in its statement of decision rendered after a nonjury

trial. [Citation.]’ [Citation.] ““Substantial evidence” is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Citations.] The focus is on the quality, rather than the quantity, of the evidence.’ [Citation.] ‘It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact.’ [Citation.] Alternatively stated, we do not evaluate the credibility of the witnesses or otherwise reweigh the evidence. [Citation.] Rather, ‘we defer to the trier of fact on issues of credibility. [Citation.]’ [Citation.]” (*Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514-515.)

C. Analysis

The principal issue at trial concerned the scope of tile work to be performed pursuant to MTK’s subcontract, or the proper and most reasonable interpretation of the terms of the subcontract as reflected in the plans and specifications for tile work. As discussed, both sides presented extensive testimony concerning their respective interpretations of the project documents. In its statement of decision, the trial court expressly found that Mr. Mekahel failed to prove his claim, and implicitly rejected Mr. Mekahel’s interpretation of the plans and specifications as calling for “patchwork” installations of tile in the various schools and no installation of mortar bed or substrate in the high school. Instead, the court accepted Mr. Balingit’s contrary interpretation of the project documents as calling for much more extensive installations of tile and the installation of mortar bed or substrate at the high school.

Substantial evidence supports this finding. First, the trial court expressly found Mr. Balingit “entirely credible” and “extremely knowledgeable” concerning the “specifics to the job in question,” or the requirements of the plans and specifications for tile work. In contrast, the court found that Mr. Mekahel’s testimony was “confusing and inconsistent with respect to the manner in which the job was originally bid.” Moreover, the court found that Mr. Mekahel’s credibility was “substantially undermined,” based on his statement to Mr. Balingit, at a meeting that took place before Mr. Mekahel began working on the project, that he had “bid the job ‘tight’” due to a perceived glitch or error in the plans, and he intended to make a claim for extra work at the end of the project. This was a reasonable basis to reject Mr. Mekahel’s testimony in its entirety.

Indeed, Mr. Mekahel claimed that when he arrived at the jobsites he was surprised to find that much more existing tile had been demolished than he had anticipated based on his reading of the plans. Consequently, he claimed that much more tile had to be installed than he had originally anticipated or bid on. Mr. Mekahel relied on a selective reading of the demolition plans and the finish schedule. Apparently, this was the “glitch or error” in the plans that Mr. Mekahel observed at the preconstruction meeting with Mr. Balingit and the owner, before Mr. Mekahel even began working on the project.

Furthermore, Mr. Mekahel’s understanding of the scope of his work was based on selective reading of the demolition plans and the finish schedule, and not on the project documents as a whole. Mr. Balingit and MTK’s expert, Mr. Chotam, agreed that a subcontractor’s scope of work must be determined based on the project documents as a

whole. And Mr. Balingit cogently explained why, in this case, the project documents as a whole required MTK to install more tile than Mr. Mekahel claimed, and install mortar bed at the high school. In addition, Mr. Mekahel's original bid of \$410,000 was not "qualified" or made expressly and ostensibly subject to Mr. Mekahel's restrictive interpretation of the project documents. It is also notable that Mr. Mekahel did not request a clarification of the plans and specifications before he bid on the job, and he did not make a claim for extra work until the job was completed.

The trial court also properly found that MTK failed to sufficiently document or prove its \$494,493.27 "total cost" claim for extra work. Mr. Mekahel admitted he did not have or had destroyed documents that would have supported his claim, and his testimony concerning the labor and materials components of his claim was confusing and inconsistent. For example, Mr. Mekahel was unclear concerning the extent to which his \$164,811.50 claim for additional labor costs was included in his \$216,000 certified payroll figure for the entire job. Mr. Tasker also found no documentation, and none was presented, to support Mr. Mekahel's \$163,409 claim for additional tile materials or his \$28,000 claim for additional raw materials. And, in view of Mr. Mekahel's failure to prove that his restrictive interpretation of the project documents was reasonable, or that his original bid was ostensibly based on that interpretation, he failed to prove he was entitled to any additional sums for extra work.

Lastly, MTK requests that this court take judicial notice of certified copies of bonds issued by Great American and Safeco on this job. The sureties oppose the request

on the grounds the documents were not introduced into evidence at trial.³ Thus, the sureties argue, the documents do not constitute court records and they are not otherwise subject to judicial notice. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).) We agree with the sureties. In any event, the matter is moot. Because MTK failed to prove its claim for extra work against Murrey, MTK is not entitled to any relief against Great American or Safeco, even if either of them issued bonds on the project.

IV. DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

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/s/ King
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ McKinster
J.

³ MTK made a belated attempt to introduce certified copies of the sureties' bonds into evidence, after the trial was closed to evidence and no witness had testified to the authenticity of the documents. For these reasons, the court refused to admit the bonds into evidence.